No. 95-791

Supreme Court, U.S.
F I L E D
DEC 21 1995

In The

Supreme Court of the United States

October Term, 1995

ALVIA E. HESTER, SR. and BRENDA HESTER, Individually and BRENDA HESTER, as Executrix of the Estate of ALVIA E. HESTER, JR., Deceased,

Petitioners,

vs.

CSX TRANSPORTATION, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

RAYMOND L. BROWN
Counsel of Record
W. MARK EDWARDS
BROWN & WATT, P.A.
Attorneys for Respondent
3112 Canty Street
P.O. Box 2220
Pascagoula, Mississippi 39569-2220
(601) 762-0035

8003
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED

Is proof required beyond the fact that federal funds participated in an FHWA-approved project for the installation of grade crossing traffic control device in order to preempt a state-law negligence claim based on a railroad's failure to determine the need for, and to install, additional devices at the crossing under *CSX Transportation, Inc. v. Easterwood*, __ U.S. __, 113 S. Ct. 1732 (1993)?

LIST OF PARTIES

1. Alvia E. Hester, Sr., *Plaintiff-Petitioner*

2. Brenda Hester, *Plaintiff-Petitioner*

3. Mark D. Lumpkin, *Counsel for Petitioner*

4. Paul S. Minor, *Counsel for Petitioner*

5. William S. Guy, *Counsel for Petitioner*

6. Raymond L. Brown, *Counsel for Respondent*

7. Patrick R. Buchanan, *Counsel for Respondent*

8. W. Mark Edwards, *Counsel for Respondent*

9. CSX Transportation, Inc., *Defendant-Respondent.*

CSX Transportation, Inc. lists the following non-wholly owned subsidiaries, pursuant to Supreme Court Rule 29(6).

1. Sea-Land Logistics, Inc.

2. Baronial Transportation Corporation

3. Akron Union Passenger Depot Company

4. Allegheny and Western Railway Company

5. Wesjax Development Company

6. Augusta and Summerville Railroad Company

7. The Baltimore and Cumberland Valley Railroad Expansion Company

8. Beaver Street Tower Company

9. Belt Railway Company of Chicago

10. Central Florida Pipeline Corporation

11. Central Transfer Railway and Storage Company

12. Charlotte Terminal Company

13. The Cleveland Terminal and Valley Railroad Company

14. The Central Railroad Company of South Carolina

15. Green Real Estate Company

16. Paducah and Illinois Railroad Company

17. TTX Company Delaware

18. Dayton and Michigan Railroad Company

19. Four Rivers Transportation, Inc.

20. The Home Avenue Railroad Company

21. The Lake Front Dock and Railroad Terminal Company

22. Midland United Corporation

23. Nicholas, Fayette and Greenbriar Railroad Company

24. Norfolk and Portsmouth Belt Line Railroad Company
25. North Charleston Terminal Company
26. Terminal Railroad Association of St. Louis
27. Mahoning State Line Railroad Company
28. The Tylerdale Connecting Railroad Company
29. Winston-Salem Southbound Railway Company
30. Woodstock and Blockton Railway Company
31. General Distribution Services Company
32. Helm-Atlantic Associates, L.P.
33. Energy Dominion
34. Yukon Pacific Corporation
35. Yukon Pacific Company, L.P.
36. James Center Development Company
37. Mid Allegheny Corporation
38. Glebe Road Associates
39. Glebe Road II Associates
40. Glebe Road III Associates

41. Harbour Associates

42. One James Center Associates

43. Richmond Center Associates

44. Richmond Center Associates II

45. St. George Seaport Associates

46. Second Street Limited Partnerships

47. Two James Center Limited Partnerships

48. Washington Harbour Associates Limited Partnerships

49. CSX Professional Services, Inc.

50. Leasing Corporation of Amer1ca Inc.

51. Encompass

52. GLVE Management Corporation

53. GLVE Management Limited Partnerships

54. Genoa Partners

55. Railroad Association Insurance Ltd.

56. Tortuga Casualty Company (5)

57. Transportation and Railroad Assurance Company, LTD.

CSX Transportation, Inc. has listed only its United States non-wholly owned subsidiaries, in the interest of economy. CSX has many foreign non-wholly owned subsidiaries, a listing of which will be provided upon request of the Court.

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OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit rendered an opinion in this case consistent with this Court's analysis in *CSX Transportation, Inc. v. Easterwood*, 113 S. Ct. 1732 (1993). The opinion of the Fifth Circuit, reported as *Hester v. CSX Transportation, Inc.*, 61 F.3d 382 (5th Cir. 1995), and the progeny it has generated, *i.e.*, *Elrod v. Burlington Northern Railroad Company*, 68 F.3d 241 (8th Cir. 1995), are not in direct

conflict with the decision of the United States Court of Appeals for the Seventh Circuit in *Shots v. CSX Transportation, Inc.*, 38 F.3d 304 (7th Cir. 1994), due to the radically different factual underpinnings of these cases.

STATUTES INVOLVED

23 U.S.C. § 106. Plans, specifications, and estimates.

> (a) Except as provided in section 117 of this title, the State highway department shall submit to the Secretary for his approval, as soon as practicable after program approval, such surveys, plans, specifications, and estimates for each proposed project included in an approved program as the Secretary may require. The Secretary shall act upon such surveys, plans, specifications, and estimates as soon as practicable after the same have been submitted, and his approval of any such project shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto. In taking such action, the Secretary shall be guided by the provisions of section 109 of this title.
>
> (b) In addition to the approval required under subsection (a) of this section, proposed specifications for projects for construction on (1) the Federal-aid secondary system, except in States where all public roads and highways are under the control and supervision of the State highway department, and (2) the Federal-aid urban system, shall be

determined by the State highway department and the appropriate local road officials in cooperation with each other.

(c) Items included in any such estimate for construction engineering shall not exceed 15 percent of the total estimated cost of a project financed with Federal-aid highway funds, after excluding from such total estimate cost, the estimated costs of rights-of-way, preliminary engineering, and construction engineering.

(d) In such cases as the Secretary determines advisable, plans, specifications, and estimates for proposed projects on any Federal-aid system shall be accompanied by a value engineering or other cost reduction analysis.

23 U.S.C. § 109. Standards.

(a) The Secretary shall not approve plans and specifications for proposed projects on any Federal-aid system if they fail to provide for a facility (1) that will adequately meed the existing and probable future traffic needs and conditions in a manner conducive to safety, durability, and economy of maintenance; (2) that will be designed and constructed in accordance with standards best suited to accomplish the foregoing objectives and to conform to the particular needs of each locality.

(b) The geometric and construction standards to be adopted for the Interstate System shall be those approved by the Secretary in cooperation with the State highway departments. Such standards, as applied to each actual construction project, shall be adequate to enable such project to accommodate the types and volumes of traffic anticipated for such project for the twenty-year period commencing on the date of approval by the Secretary, under section 106 of this title, of the pans, specifications, and estimates for actual construction of such project. Such standards shall in all cases provide for at least four lanes of traffic. The right-of-way width of the Interstate System shall be adequate to permit construction of projects on the Interstate System to such standards. The Secretary shall apply such standards uniformly throughout all the States.

(c) Projects on the Federal-aid secondary system in which Federal funds participate shall be constructed according to specifications that will provide all-weather service and permit maintenance at a reasonable cost.

(d) On any highway project in which Federal funds hereafter participate, or on any such project constructed since December 20, 1944, the location, form and character of informational, regulatory and warning signs, curb and pavement or other markings, and

traffic signals installed or placed by any public authority or other agency, shall be subject to the approval of the State highway department with the concurrence of the Secretary, who is directed to concur only in such installations as will promote the safe and efficient utilization of the highways.

(e) No funds shall be approved for expenditure on any Federal-aid highway, or highway affected under chapter 2 of this title, unless proper safety protective devices complying with safety standards determined by the Secretary at that time as being adequate shall be installed or be in operation at any highway and railroad grade crossing or drawbridge on that portion of the highway with respect to which such expenditures are to be made.

(f) The Secretary shall not, as a condition precedent to his approval under section 106 of this title, require any State to acquire title to, or control of, any marginal land along the proposed highway in addition to that reasonably necessary for road surfaces, median strips, bikeways, gutters, ditches, and side slopes, and of sufficient width to provide service roads for adjacent property to permit safe access at controlled locations in order to expedite traffic, promote safety, and minimize roadside parking.

(g) The Secretary shall issue within 30 days after the day of enactment of the

Federal-Aid Highway Act of 1970 guidelines for minimizing possible soil erosion from highway construction. Such guidelines shall apply to all proposed projects with respect to which plans, specifications, and estimates are approved by the Secretary after the issuance of such guidelines.

(h) Not later than July 1, 1972, the Secretary, after consultation with appropriate Federal and State officials, shall submit to Congress, and not later than 90 days after such submission, promulgate guidelines designed to assure that possible adverse economic, social, and environmental effects relating to any proposed project on any Federal-aid system have been fully considered in developing such project, and that the final decisions on the project are made in the best overall public interest, taking into consideration the need for fast, safe and efficient transportation, public services, and the costs of eliminating or minimizing such adverse effects and the following:

(1) air, noise, and water pollution;

(2) destruction or disruption of man-made and natural resources, aesthetic values, community cohesion and the availability of public facilities and services;

(3) adverse employment effects, and tax and property value losses;

(4) injurious displacement of people, businesses and farms; and

(5) disruption of desirable community and regional growth. Such guidelines shall apply to all proposed projects with respect to which plans, specifications and estimates are approved by the Secretary after the issuance of such guidelines.

(i) The Secretary, after consultation with appropriate Federal, State, and local officials, shall develop and promulgate standards for highway noise levels compatible with different land uses and after July 1, 1972, shall not approve plans and specifications for any proposed project on any Federal-aid system for which location approval has not yet been secured unless he determines that such plans and specifications include adequate measures to implement the appropriate noise level standards. The Secretary, after consultation with the Administrator of the Environmental Protection Agency and appropriate Federal, State, and local officials, may promulgate standards for the control of highway noise level standards for highways on any Federal-aid system for which project approval has been secured prior to July 1, 1972. The Secretary may approve any project on a Federal-aid system to which noise-level standards are made applicable under the preceding sentence for the purpose of

carrying out such standards. Such project may include, but is not limited to, the acquisition of additional rights-of-way, the construction of physical barriers, and landscaping. Sums apportioned for the Federal-aid system on which such project will be located shall be available to finance the Federal share of such project. Such project shall be deemed a highway project for all purposes of this title.

(j) The Secretary, after consultation with the Administrator of the Environmental Protection Agency, shall develop and promulgate guidelines to assure that highways constructed pursuant to this title are consistent with any approved plan for the implementation of any ambient air quality standard for any air quality control region designated pursuant to the Clean Air Act, as amended.

(k) The Secretary shall not approve any project involving approaches to a bridge under this title, if such project and bridge will significantly affect the traffic volume and the highway system of a contiguous State without first taking into full consideration the views of that State.

(l)(1) In determining whether any right-of-way on any Federal-aid system should be used for accommodating any utility facility, the Secretary shall —

(A) first ascertain the effect such use will have on highway and traffic safety, since in no case shall any use be authorized or otherwise permitted, under this or any other provision of law, which would adversely affect safety;

(B) evaluate the direct and indirect environmental and economic effects of any loss of productive agricultural land or any impairment of the productivity of any agricultural land which would result from the disapproval of the use of such right-of-way for the accommodation of such utility facility; and

(C) consider such environmental and economic effects together with any interference with or impairment of the use of the highway in such right-of-way which would result from the use of such right-of-way for the accommodation of such utility facility.

(2) For the purpose of this subsection —

(A) The term "utility facility" means any privately, publicly, or cooperatively owned line, facility, or system for producing, transmitting, or distributing communications, power, electricity, light, heat, gas, oil, crude

projects, water, steam, waste, storm water not connected with highway drainage, or any other similar commodity, including any fire or police signal system or street lighting system, which directly or indirectly serves the public; and

(B) The term "right-of-way" means any real property, or interest therein, acquired, dedicated, or reserved for the construction, operation, and maintenance of a highway.

(m) The Secretary shall issue guidelines describing the criteria applicable to the Interstate System in order to insure that the condition of these routes is maintained at the level required by the purposes for which they were designed. The initial guidelines shall be issued no later than October 1, 1979.

(n) The Secretary shall not approve any project under this title that will result in the severance or destruction of an existing major route for nonmotorized transportation traffic and light motorcycles, unless such project provides a reasonably alternate route or such a route exists.

(o) It is the intent of Congress that any project for resurfacing, restoring, or rehabilitating any highway, other than a highway access to which is fully controlled,

in which Federal Funds participate shall be constructed in accordance with standards to preserve and extend the service life of highways and enhance roadway safety.

23 U.S.C. § 110. Project agreements.

(a) As soon as practicable after the plans, specifications, and estimates for a specific project have been approved, the Secretary shall enter into a formal project agreement with the State highway department concerning the construction and maintenance of such project. Such project agreement shall make provision for State funds required for the State's pro rata share of the cost of construction of such project and for the maintenance thereof after completion of construction.

(b) The Secretary may rely upon representations made by the State highway department with respect to the arrangements or agreements made by the State highway department and appropriate local officials where a part of the project is to be constructed at the expense of, or in cooperation with, local subdivisions of the State.

23 C.F.R. § 646.204. Definitions.

For the purposes of this subpart, the following definitions apply:

(a) *Railroad* shall mean all rail carriers,

publicly-owned, private, and common carriers, including line haul freight and passenger railroads, switching and terminal railroads and passenger carrying railroads such as rapid transit, commuter and street railroads.

(b) *Utility* shall mean the lines and facilities for producing, transmitting or distributing communications, power, electricity, light, heat, gas, oil, water, steam, sewer and similar commodities.

(c) *Company* shall mean any railroad or utility company including any wholly owned or controlled subsidiary thereof.

(d) *'G' funds* signify those Federal-aid highway funds which, pursuant to 23 U.S.C. 120(d), may be used for projects for the elimination of hazards of railroad-highway crossings not to exceed 10 percent of Federal-aid funds apportioned in accordance with 23 U.S.C. 104.

(e) *Preliminary engineering* shall mean the work necessary to produce construction plans, specifications, and estimates to the degree of completeness required for undertaking construction thereunder, including locating, surveying, designing, and related work.

(f) *Construction* shall mean the actual physical construction to improve or

eliminate a railroad-highway grade crossing or accomplish other railroad involved work.

(g) *A diagnostic team* means a group of knowledgeable representatives of the parties of interest in a railroad highway crossing or a group of crossings.

(h) *Main line railroad track* means a track of a principal line of a railroad, including extensions through yards, upon which trains are operated by timetable or train order or both, or the use of which is governed by block signals or by centralized traffic control.

(i) *Passive warning devices* means those types of traffic control devices, including signs, markings and other devices, located at or in advance of grade crossings to indicate the presence of a crossing but which do not change aspect upon the approach or presence of a train.

(j) *Active warning devices* means those traffic control devices activated by the approach or presence of a train, such as flashing light signals, automatic gates and similar devices, as well as manually operated devices and crossing watchmen, all of which display to motorists positive warning of the approach or presence of a train.

STATEMENT OF THE CASE

On July 22, 1989, Petitioner's decedent, Alvia E. Hester, Jr., was a passenger in an automobile which failed to stop for a CSX locomotive and train at the Hatley Circle crossing in Orange Grove, Jackson County, Mississippi.[1] (R. 175-177). The Hatley Circle crossing, prior to the date of the accident, had received upgraded warnings in the form of advance warning signs, advance pavement markings, and reflectorized crossbucks. (R. 784-822; 841-843). These warnings were within the federal definition of passive warning devices under 23 C.F.R. §§ 646.204(i) and (j) (1992). The warnings were approved prior to installation by the FHWA. (R. 961-967). Likewise, the warnings installed at this crossing, among others, were subsequently approved by the FHWA after its statewide inspection. (R. 805-809; 817-818). The warning devices approved and installed at the Hatley Circle crossing were paid for by a federal safety funding program. (R. 789-790). Pursuant to the federal regulatory scheme, the State of Mississippi was required, as soon as practicable after program approval, to submit surveys, plans and cost estimates for each individual project that was to be included in a federally funded safety program to the Secretary of Transportation. 23 U.S.C. § 106(a) (1992). After the transmission of the plans and specifications, they must be approved as adequate by the Secretary. 23 U.S.C §§ 109(d)and (e) (1992).

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1. Despite the assertions of the Hesters, Hatley Circle is not a high speed crossing. 49 C.F.R. §213.9 authorizes a speed of only 60 m.p.h. for freight trains on the class 4 track at the subject crossing. Pursuant to 49 C.F.R. §213.9, speeds of 80-110 mph may be authorized for Class 5 and 6 track, respectively. Therefore, as the regulations indicate, the maximum authorized speed at Hatley Circle is only slightly higher than one-half of the possible federal authorized speeds. Hatley Circle is not a high speed crossing. Therefore, the provisions of 23 C.F.R. §§ 646.214(b)(3)(i)(C) and (D) do not apply to this crossing. *Id.*

Pursuant to the agreement between the State of Mississippi and the federal government, which provided the federal funds for the pavement markings, the State of Mississippi contractually agreed that it would not permit any warnings to be installed which did not conform with the federal requirements. (R. 964 at § 11). Further, CSX demonstrated that it participated in the diagnostic review process for the Hatley Circle crossing. (R. 848-849; 999). These diagnostic recommendations were likewise required to be approved pursuant to the regulations prior to the expenditure of federal funds. 23 U.S.C. §§ 109(d) and (e) (1992).

Considering the above information, the District Court held, pursuant to CSX's Motion to Reconsider, that the Hesters' claims against CSX for alleged inadequate warning devices at the Hatley Circle crossing were preempted by the Federal Rail Safety Act of 1970 (FRSA), 45 U.S.C. § 421 *et seq.* and the Highway Safety Act of 1973 (HSA), 23 U.S.C. § 130 *et seq.* This matter was then appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed the District Court's findings. The Hesters then petitioned for certiorari in this Court, perceiving a false conflict between the Fifth Circuit's decision in *Hester*, and the United States Court of Appeals for the Seventh Circuit's decision in *Shots v. CSX Transportation, Inc.*, 38 F.3d 304 (7th Cir. 1994). CSX respectfully submits that there is no such conflict, given an examination of the respective records.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO REAL CONFLICT BETWEEN THE *HESTER* AND *SHOTS* DECISIONS.

The Hesters assert that the decision of the Fifth Circuit in *Hester* presents a direct conflict with the decision of the Seventh

Circuit in *Shots v. CSX Transportation, Inc.*, 38 F.3d 304 (7th Cir. 1994), on the issue of federal preemption. However, a simple analysis of the record below, contrasted with the *Shots* opinion, demonstrates that, at best, there is only an illusory conflict due to the radically dissimilar factual backgrounds of the two cases.

The basis for all preemption analysis is the Federal Rail Safety Act of 1970 (FRSA), 45 U.S.C. § 421 *et seq.* and the Highway Safety Act of 1973 (HSA), 23 U.S.C. § 130 *et seq.*, as well as the regulations issued pursuant to these acts. This Court made the importance of the regulations abundantly clear in *Easterwood*, when it held:

> . . . 23 CFR §§ 646.214(b)(3) and (4) . . . do establish requirements as to the installation of particular warning devices. *Examination of these regulations demonstrates that, when they are applicable, state tort law is preempted.*
>
> * * *
>
> In short, *for projects in which federal funds participate in the installation of warning devices, the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection. The Secretary's regulations therefore cover the subject matter of state law* which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings.

Easterwood, 113 S. Ct. at 1740-41 (emphasis added).

In *Shots*, the only evidence of record was the IndDot-L&N (the predecessor of CSX) Master Agreement for the crossbuck project. *Shots*, 38 F.3d at 308. The agreement (contract) was created and signed by IndDOT and L&N *prior* to the issuance of 23 C.F.R. § 646.214 (covering devices to be installed where federal funds participate in projects for the installation of grade crossing traffic control devices). *Shots*, 38 F.3d at 306. The agreement was approved by the FHWA/Secretary of Transportation only five days after the regulations were issued and without a recommendation by a diagnostic team.

Clearly, the *Shots* decision was decided in a vacuum, since the decision is based on an analysis of a DOT-railroad master agreement which was written before the promulgation of 23 C.F.R. § 646.214 in 1975, and no other documentation was available to the Seventh Circuit. Because 14 years had passed between the project and the accident, there was virtually no factual information available for the *Shots* project. Notably, in contrast to the present case, *Shots* could not discuss whether the State DOT had a diagnostic team, had begun its required hazard rankings/priority listings for grade crossings,[2] or even what was done with respect to the project.

Because no proof was available, the Seventh Circuit in *Shots* was forced to decide the preemption issue solely on an analysis of the IndDOT L&N agreement, in order to determine whether or not FHWA made any determination of the devices to be installed at the crossing when it approved the agreement for the state-wide project. Given that the agreement central to the *Shots* analysis predated the pertinent federal regulations, the Seventh Circuit

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2. 23 C.F.R. § 924.9(a)(4) specifically requires that state DOT improvement projects consider the relative hazard of railroad grade crossings based on a hazard index formula, and that subsequent projects be undertaken on the basis of a priority system developed by the state DOT. *Id.*

did not analyze the effect of 23 U.S.C. §§ 109(d) and (e), and concluded that FHWA approval of the project was something less than a determination of the adequacy of the traffic control devices. *Shots*, 38 F.3d at 309. These provisions of Section 109 provide that the Secretary may only concur in "such installations as will promote the safe and efficient use of the highways," and that federal funds shall not be approved for expenditure "unless proper safety protective devices complying with safety standards determined by the Secretary at that time as being adequate shall be installed . . . at any . . . railroad grade crossing . . . with respect to which such expenditures are to be made." *Id.* In the case *sub judice*, the MDOT contractually agreed with FHWA to comply with 23 U.S.C. and all FHWA regulations, and in § 11 specifically acknowledged the requirements of 23 U.S.C. § 109(d). (R. 963-64).

The record in the District Court, and considered by the Fifth Circuit in *Hester*, is remarkably different from the factual vacuum present in *Shots*. The record here demonstrates that the Hatley Circle crossing, prior to the date of the accident, had received upgraded warnings in the form of advance warning signs, advance pavement markings, and reflectorized crossbucks. (R. 784-822; 841-843). The warnings were approved prior to installation by the FHWA. (R. 961-967). Likewise, the warnings installed at this crossing, among others, were subsequently approved by the FHWA after its statewide inspection. (R. 805-809; 817-818). The warning devices installed at the Hatley Circle crossing were paid for by a federal safety funding program. (R. 789-790). Pursuant to the federal regulatory scheme, the State of Mississippi was required, as soon as practicable after program approval, to submit surveys, plans and cost estimates for each individual project included in a federally funded safety program to the Secretary of Transportation. 23 U.S.C. § 106(a) (1992). After the transmission of the plans and specifications, they were required

to be approved as adequate by the Secretary. 23 U.S.C. § 109(d) & (e) (1992).[3]

Pursuant to the agreement between the State of Mississippi and the federal government which provided the federal funds for the pavement markings, the State of Mississippi contractually agreed that it would not permit any warnings to be installed which did not conform with the federal requirements. (R. 964 at § 11). Further, CSX demonstrated that it participated in the diagnostic review process for the Hatley Circle crossing. (R. 848-849; 999). These diagnostic recommendations were likewise required to be approved pursuant to the regulations prior to the expenditure of federal funds. 23 U.S.C. §§ 109(d) and (e) (1992).

The records in the *Shots* and *Hester* cases are in stark contrast to each other. The *Hester* record contains all of the information that the Seventh Circuit lacked to guide its analysis in *Shots*. Had this information been present in *Shots*, and had the Seventh Circuit considered the application of 23 U.S.C. §§ 109(d) and (e)[4], there is no doubt that this Court's decision in

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3. As the secretary has made a determination as to the adequacy of the devices at the Hatley Circle crossing, even the *Shots* opinion would prevent the post-decision challenge the Hesters are attempting. *Shots*, 38 F.3d at 308.

4. This approach is the same as taken by the Solicitor General that "federal funding of an improvement project is the sole trigger of federal preemption" which was adopted by this Court in *Easterwood*. The Solicitor General argued that:

> The scope of 23 C.F.R. 646.214(b) indicated that for federally funded projects the Secretary has covered the subject matter of what safety devices are appropriate. The regulations require gate arms in certain circumstances, and requires FHWA approval of the

(Cont'd)

Easterwood would have been followed. Therefore, it can be seen that there is no real conflict between the Fifth and Seventh Circuits with regard to the preemption issue. Therefore, this Court should deny the Petition for Certiorari.

II.

RECENTLY PROPOSED REGULATIONS SUPPORT THE DENIAL OF CERTIORARI.

It is important to note that, after the case *sub judice* was decided, the Secretary of Transportation proposed federal regulations which would clarify the scope and timing of the preemption of a railroad's common law duty to either evaluate or improve the adequacy of warning devices at a grade crossing. On March 2, 1995, the Federal Railroad Administration proposed regulations that specifically address the allocation of responsibilities between the federal government, the states, and the railroads. These proposed regulations are instructive as to the intent of the Department of Transportation in this area.

The sum and substance of these proposed regulations is that the existence of the federal program, and the participation of the railroad in this program, should preempt any state law duties imposed on railroads to provide additional warning devices at

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(Cont'd)

> safety devices in all other circumstances. Thus, the warning devices in place at a crossing improved with federal funds have, by definition, been specifically found to be adequate under a regulation issued by the secretary. Any state rule that more or different crossing devices were necessary at a federally funded crossing is therefore preempted.

Brief of the United States As Amicus Curiae, p. 27, filed in *CSX Transportation, Inc. v. Easterwood*, __ U.S. __, 113 S. Ct. 1732.

railroad grade crossings. 41 Fed. Reg. 11,649 (March 2, 1995). These regulations would make plain that the various state highway and transportation departments, such as the Mississippi Department of Transportation, and *not* the railroads, are best qualified to assume the responsibility of deciding when and how to improve grade crossing safety.

According to the Secretary of Transportation, decision making by the states, exclusive of the railroads, is the present federal system. 23 C.F.R. § 924. Under the proposed new regulations, this system will continue in operation. 41 Fed. Reg. at 11,649-51. In an explicit final clarification of the preemptive effect of the current and proposed regulations, the Secretary specifically noted that the proposed regulations would "substantially subsume" the subject matter of railroads' selection and installation of highway-rail grade crossing warning systems . . .", therefore preempting state common law. 41 Fed. Reg. at 11,651.

In *Easterwood*, this Court concluded that it was "not prepared to find preemption based solely on the strength of the general mandate of 23 C.F.R. pt. 924". *Easterwood*, 113 S. Ct. at 1740. The Secretary's proposed regulations, which should soon become law, call this part of *Easterwood*'s rationale into doubt. In fact, in his commentary on the proposed rules, the Secretary of Transportation discussed and expressed a contrary view as to this aspect of *Easterwood*. 41 Fed. Reg. at 11,651-52. The proposed regulations would correct that portion of *Easterwood*. In the view of the Secretary, the entire state-driven system of ranking grade crossing hazards and prioritizing the greatest crossing hazards for elimination through improved warning devices triggers federal preemption of common law claims.[5] According

5. The regulatory scheme advocated by the Secretary of Transportation is, in his view, the only way to ensure the investment of "grade crossing (Cont'd)

to the Secretary, preemption occurs *before* federal approval or funding of particular devices. Thus, this Court's focus in *Easterwood*, on federal funding and approval of particular projects as the key preemption events was, according to the Secretary, misplaced. 41 Fed. Reg. 11,651-52.

As may be seen, the proposed regulations would effectively make inapplicable this Court's decision in *Easterwood*, which held that a railroad's state law duties could complement the federal program's procedures for evaluating, rating and upgrading grade crossings. The implication of the Secretary of Transportation's proposed regulation is clear: it mitigates heavily against a grant of certiorari.

If the Secretary's proposed regulations are adopted, then the real issue in this case, the effect of the requirement that the Secretary of Transportation approve the level of protection at crossings where federal funds are used, will have ostensibly been answered by the regulations for all future cases. The questions then proposed in this genre of cases will turn to the correct application of the new regulations. Any decision by this Court in the interim period will impact, at most, only an handful of cases which are currently pending. In the alternative, if the proposed regulations are not adopted, other courts will have an opportunity to consider the preemption issue based on more fully developed factual records. If the pseudo-conflict urged by the Petitioners does in fact emerge in subsequent cases, this Court (should it decide that the issue deserves consideration) will then have the benefit of those courts' analyses and the issues will have been more fully framed.

(Cont'd)
improvement funds where the most lives will be saved and the most injuries prevented." 41 Fed. Reg. at 11,651. Petitioners' inadequate warnings claim, however, would entirely abrogate the laudable safety effort of the regulatory system.

This Court is the final arbiter of the most significant constitutional questions presented in American jurisprudence. As such, the Court faces serious demands on available time and resources. This Court should not grant certiorari in the present situation, where the decision of the Court may very well be of no precedential value. In the interest of comity and judicial economy, it would seem more prudent for this Court to wait and see if the regulations proposed by the Secretary of Transportation are adopted, before the Court decides if it needs to address the very narrow issue of federal preemption at grade crossings raised by Petitioners in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

RAYMOND L. BROWN
Counsel of Record
W. MARK EDWARDS
BROWN & WATT, P.A.
Attorneys for Respondent
3112 Canty Street
P.O. Box 2220
Pascagoula, Mississippi 39569-2220
(601) 762-0035